Supreme Court, U.S.
FILED

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No. ——— OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH R. STRAWBERRY,
Petitioner,

v.

MADELEINE ALBRIGHT,
SECRETARY, U.S. DEPARTMENT OF STATE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not it is a violation of the Age Discrimination Employment Act to mandatorily retire a civil service participant in the Department of State's Foreign Service Pension System at age sixty-five (65).

2. Whether or not the United States Congress in enacting the Federal Employees' Retirement System Act, P.L. 99-335, 22 U.S.C. § 4071(a) and (d) extended the mandatory retirement age of 22 U.S.C. 4052(a) to civil service participants in the Foreign Service Pension System.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ———

KENNETH R. STRAWBERRY,
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v.

MADELEINE ALBRIGHT,
SECRETARY, U.S. DEPARTMENT OF STATE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

STATEMENT ON CITATIONS, JURISDICTION AND NOTIFICATION

1. *Citations*—The decision of the Court of Appeals for the District of Columbia Circuit is reported at *Strawberry v. Albright*, 111 F.3d 943, 324 U.S.D.C. App. 184 (D.C. Cir. 1997). No other citations of this opinion have been made by any court or administrative agencies.

2. Review is sought, pursuant to Sup. Ct. R. 10 from the order of the United States Court of Appeals for the District of Columbia Circuit which applied the Federal Employees Retirement Systems Act in a manner which is in conflict with this Court's ruling in *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L.Ed.2d 171 (1979),

holding that civil service employees are not subject to a mandatory retirement age and in conflict with the Age Discrimination In Employment Act, 29 U.S.C. § 633a, which prohibits the use of age in making employment decisions.

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition seeks review of the order of the United States Court of Appeals for the District of Columbia Circuit dated May 2, 1997. The petition for rehearing was denied on August 26, 1997.

4. The Solicitor General of the United States has been notified of the filing of this Petition for Writ of Certiorari by depositing a copy of this Petition for Writ of Certiorari in the United States mail, first class postage attached, addressed to the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Avenue, N.W., Washington, D.C. 20530 and a copy has been served upon Darya Geetter, Asst. U.S. Attorney, 555 Fourth St., N.W., Wash.. D.C. 20001, first class postage attached, U.S. Mail.

STATUTES, REGULATIONS, AND OTHER AUTHORITIES

1. 22 U.S.C. § 4052. Mandatory Retirement (App., *infra*, at 12a).

2. 22 U.S.C. 4071. Establishment; application of Federal Employees' Retirement System to Foreign Service Pension System participants (App., *infra*, at 12a).

3. 22 U.S.C. 4071b. Participants (App., *infra, at* 12a).

4. 22 U.S.C. § 4071d. Entitlement to annuity (App., *infra*, at 14a).

5. 29 U.S.C. 633a. Nondiscrimination on account of age in Federal Government Employment (App., *infra*, at 14a).

STATEMENT OF THE CASE

This matter arose in the United States District Court for the District of Columbia Circuit based upon a civil action filed by Kenneth R. Strawberry, hereinafter the Petitioner, for his mandatory retirement based upon his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. 633a, A. 7a, from his position as a civil service employee with the U.S. Department of State, hereinafter the Respondent. On June 4, 1996, James Robertson, United States District Judge, relying on *Bradley v. Kissinger*, 418 F. Supp. 64 (D. D.C. 1976), granted summary judgment in favor of the Respondent and dismissed the action filed by the petitioner ruling that the mandatory retirement age set forth in the 1980 Foreign Service Act, 22 U.S.C. § 4052a, A. 8a, granted a statutory exemption to the Respondent which permitted retirement based upon age. Petitioner filed an appeal and on May 2, 1997, the United States Court of Appeal for the District of Columbia Circuit granted summary affirmance of the order of the District Court, A. 1a, ruling that the mandatory retirement provision was extended to the petitioner as a participant in the Foreign Service Pension System, A. 5a.

On June 16, 1997, Petitioner filed a petition for a rehearing and on August 26, 1997, the United States Court of Appeals for the District of Columbia Circuit denied the petition for rehearing, A. 11a.

The Petitioner began employment with the Respondent as a member of the Respondent's Foreign Service. In 1984, the Petitioner was mandatorily converted to the civil service pursuant to the 1980 Foreign Service Act, which was required for all individuals who did not wish to serve in assignment overseas. A. 24a. In 1987, the Petitioner, at his election, transferred his retirement to the Respondent's Foreign Service Pension System. A. 25a. In 1995, the Petitioner turned age sixty-five (65) and was retired by the Respondent pursuant to the 1980 Foreign Service Act, 22 U.S.C. § 4052(a), A. 17a, 25a. The Peti-

tioner was an outstanding employee having been recommended for a pay increase for outstanding performance for his work. Respondent did not dispute that Petitioner was retired solely based upon the mandatory age requirement of 22 U.S.C. § 4052(a), A. 17a.

REASONS FOR GRANTING THE WRIT

I. MANDATORY RETIREMENT OF A CIVIL SERVICE EMPLOYEE PARTICIPANT IN THE FOREIGN SERVICE PENSION SYSTEM IS CONTRARY TO THIS COURT'S DECISION IN *VANCE v. BRADLEY* AND IS A VIOLATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

The decision of the United States Court of Appeals for the District of Columbia Circuit presents an issue of first impression to this Court. *Vance v. Bradley,* 440 U.S. 93, 99 S. Ct. 939, 939 L.Ed.2d. 171 (1979), in ruling on a challenge of denial of equal protection under the Fifth Amendment to the United States Constitution, held that the statutory exemption set forth in 22 U.S.C. 4052 (a) was a legitimate exercise of legislative authority and was enacted to further a legitimate state interest. In reaching this conclusion, this Court examined the legislative history and found that Congress intended to have younger persons serve in overseas positions. The Court also found that the limitation of the exemption to individuals in the respondent's Foreign Service, excluding individual's in overseas civil service positions, was a legitimate policy choice which was within the purview of the Congress to make.

In 1986, after this Court's decision in *Vance supra,* the United States Congress enacted the Federal Employees' Retirement System Act, 22 U.S.C. 4071, A. 12a, which established a new pension system for federal employees and established the Foreign Service Pension System. The Foreign Service Pension System, like the system estab-

lished for all federal civilian employees, is a contributory plan with a Thrift Savings Plan and social security, A. 12a. The House Report accompanying the passage of the Federal Employees' Retirement System Act stated that different treatment was provided for the Foreign Service to allow for

> ". . . continued operation of its special personnel system with its up-or-out and rank-in-person rather than rank-in-position features and continued administration of the system by the Secretary of State," H.R. Rep. 99-606, 99th Cong., 2nd Sess., *reprinted in,* 1986 U.S. Code Cong. & Admin. News 1529.

The question presented by this case, has not previously been considered by this Court. The Petitioner in this case was employed in the civil service, in a position which was not subject to the rank-in-person and up-or-out system which the United States Congress was addressing in establishing a mandatory retirement age of sixty-five pursuant to 22 U.S.C. § 4052(a). This Court in *Western Airlines v. Criswell,* 472 U.S. 400, 410-411, 105 S. C.t 2743, 86 L.Ed.2d 321 (1985) in ruling on mandatory retirement provisions, as an exception to the requirements of the Age Discrimination In Employment Act for private sector employers, noted that the 1978 Amendments to the Age Discrimination In Employment Act were to apply particularly to mandatory retirement provisions and held that the bona fide occupational qualification exception was subject to an extremely narrow interpretation. The Court particularly focused on the fact that arbitrary age limits were found to have no reasonable relationship to abilities to perform the work of employers and held that studies confirmed that mandatory retirement was detrimental to individuals, workers and society as a whole, *Id.* at 472 U.S. 411.

The issue of the mandatory age requirement of the Respondent's plan as a violation of the Age Discrimina-

tion In Employment Act was not considered by this Court in *Vance, supra.* at 440 U.S. 95, n.2. However, in *Johnson v. Baltimore,* 472 U.S. 353, 105 S. Ct. 277, 86 L.Ed. 2d 86 (1985), this Court in ruling on a mandatory retirement age for state and local firefighters, reviewed the history of the Age Discrimination In Employment Act and its amendments, noting at 472 U.S. 366 that federal employees cannot be forced to retire at any age and the legislative history of the 1978 amendment supported the removal of all age limits for federal employees. In addition, the Court in *Johnson, Id.* 472 U.S. 366, n.10, looked to the intent of Congress in establishing a mandatory retirement age for federal firefighters and concluded that Congress could establish a mandatory retirement age based upon legitimate policy concerns.

No case has come before the court which presented the issue of whether Congress, in enacting the mandatory retirement age set forth in 22 U.S.C. § 4052(a) intended to require retirement at age sixty-five (65) based upon participation in the Foreign Service Pension System and whether imposition of the mandatory retirement age to an individual in a civil service position is a violation of the Age Discrimination In Employment Act. This case presents for decision the issue of whether the Congress intended to extend mandatory retirement to an employee based upon participation in the Foreign Service Pension System rather than based upon Congress's clearly stated purpose of supporting a rank-in-person system rather than a rank-in-position system.

The Federal Employees' Retirement Systems Act of 1986, which was enacted after the amendment of the Age Discrimination In Employment Act in 1978, required that all participants in the Foreign Service Pension System be treated in the same manner as persons in the Federal Employees' Retirement System, A. 12a. Nothing in the Federal Employees' Retirement System Act indicates a legis-

lative intent to extend a mandatory retirement age to individuals based upon mere participation in the retirement system. The order of the Court below extends the mandatory retirement age not based upon a clear statement of Congress to provide for such an extension but based upon a reference in 22 U.S.C § 4071d(a) which defines participants under the Act and based upon a reference in 22 U.S.C. § 4071(b) of the words "Except as otherwise specifically provided in this subchapter. . . ." Reliance on this small portion of the Federal Employees' Retirement Systems Act to abridge the rights of an employee in the civil service appears to directly contradict the expressed intent of Congress to apply the same rights to the Foreign Service Pension System as that enjoyed by federal employees.

The interpretation of the Federal Employees' Retirement System Act as providing a statutory exemption for the respondent based upon participation in Respondent's Foreign Service Pension System is directly contrary to Congress' stated purpose in enacting the Federal Employees' Retirement Systems Act and is in violation of the express prohibition of mandatory retirement in the Age Discrimination In Employment Act. 22 U.S.C. § 4052a was not intended by Congress to apply to individuals in the civil service and nothing in the legislative history of the 1980 Foreign Service Act or the Federal Employees' Retirement System Act indicate a Congressional intent to apply the mandatory retirement age to employees in civil service positions.

CONCLUSION

The petitioner submits that the order of the United States Court of Appeals for the District of Columbia Circuit presents a case of first impression concerning the rights of employees serving in civil service positions to be free of discrimination based upon their age as required by the Age Discrimination In Employment Act. Petitioner respectfully requests that this Court grant petitioner's request

for a writ of certiorari for consideration of this important federal question.

Respectfully Submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed May 2, 1997

No. 96-5221

KENNETH STRAWBERRY,
Appellant

v.

MADELEINE ALBRIGHT, SECRETARY,
U.S. DEPARTMENT OF STATE,
Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 95cv01946)

ON MOTION FOR SUMMARY AFFIRMANCE

Before: WALD, WILLIAMS, and TATEL, Circuit Judges.

Opinion for the Court filed PER CURIAM.

PER CURIAM: Kenneth Strawberry appeals an order granting summary judgment for the Secretary of State in this age discrimination dispute. Strawberry asserts that the Secretary violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, by "forcing" him to retire at age 65. Because Strawberry elected to participate in a retirement system with a statutorily-

mandated retirement age of 65 and because the Secretary's compliance with the statute does not violate the ADEA, we grant the Secretary's motion for summary affirmance.

I. Background

In February 1984, Strawberry was mandatorily converted from a Foreign Service Reserve position to a civil service position because he was not available for worldwide assignment. Under 22 U.S.C. § 4156(b), Strawberry had the option of remaining in the Foreign Service Retirement and Dsiability System ("FSRDS") or transferring to the Civil Service Retirement and Disability System ("CSRS"). He chose to remain in the FSRDS, which provides a more generous annuity and allows earlier voluntary retirement, *see id.* §§ 4046, 4051, but has a mandatory retirement age of 65, *see id.* § 4052.

After Congress established the Foreign Service Pension System ("FSPS") in 1986, Strawberry had a choice between remaining in the FSRDS or transferring to the FSPS. The FSPS offes a slightly smaller annuity, but provides Social Security coverage and allows participation in the Thrift Savings Plan. In October 1987, Strawberry tansferred to the FSPS, which incorporates the FSRDS's mandatory retirement provision. *See id.* § 4071(a)(1).

Strawberry was due to retire on July 31, 1995, the last day of the month in which he turned 65. However, he sought a waiver of mandatory retirement under § 4052(b), which allows the Secretary to retain an employee on active service if she determines it to be in the public interest. The Secretary denied the waiver request, and Strawberry retired as scheduled on July 31, 1995.

In October 1995, Strawberry filed suit in district court alleging that the Secretary had violated the ADEA by forcing him to retire at 65. Strawberry sought reinstatement, backpay, damages, and a jury trial.[1] The district

[1] The Secretary moved to strike the request for damages and a jury trial, arguing that 42 U.S.C. § 1981a (the authority cited by

court granted the Secretary's motion for summary judgment in June 1996. The court noted that the Foreign Service Act of 1980 maintained the mandatory retirement provision of the Foreign Service Act of 1946 but raised the mandatory retirement age from 60 to 65, and that the Federal Employees' Retirement System Act of 1986 made the mandatory retirement age applicable to the FSPS. The court then held:

> Longstanding principles of statutory interpretation hold that, where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. This is particularly so when the specific statute is enacted at the same time as, or after, a more general provision. The enactments of 1980 and 1986, each of which post-date[s] the ADEA and specifically provide[s] for the mandatory retirement of Foreign Service employees, must be given full force and effect. The ADEA's general prohibition of age discrimination cannot be read to prevent the implementation of the mandatory retirement provisions of the Foreign Service Act.

6/4/96 Memorandum at 3 (citations omitted). This appeal followed.

II. Analysis

Strawberry argues that the mandatory retirement age of 65 applies only to those in the Foreign Service, not to those who were converted to civil service positions. He first asserts that "§ 4052 provides that 'members of the Foreign Service' shall be retired at age sixty-five." Response to Motion for Summary Affirmance at 2. He next asserts that the legislative history of § 4052 shows that Congress intended that the mandatory retirement age apply to members of the Foreign Service serving in overseas posts, and that neither the Foreign Service Act of 1980 nor the Federal Employees' Retirement System Act

---

Strawberry) does not apply to ADEA claims. The district court did not rule on the motion, and Strawberry does not raise the matter on appeal.

of 1986 required that any other employees retire at age 65. Indeed, he contends that the FSPS "specifically removed employees such as Mr. Strawberry from the [FSRDS] which required mandatory retirement at age sixty-five." Response to Motion for Summary Affirmance at 3. Strawberry adds that his forced retirement was contrary to the requirement that participants in the FSPS be treated like participants in the Federal Employees' Retirement System ("FERS"). This argument appears to be based on the fact that FERS does not include the mandatory retirement age contained in the FSRDS and FSPS. Finally, he argues that a mandatory retirement age of 65 renders the FSPS "superfluous," although the basis for this argument is not entirely clear. *See* Response to Motion for Summary Affirmance at 4-5.

Strawberry's aguments are meritless. Section 4052(a) does not state that "members of the Foreign Service" shall be retired at age 65, as Strawberry asserts. Rather, it provides that, with an exception not relevant here, "any participant [in the FSRDS] shall be retired from the Service" at age 65. While participation in the FSRDS was originally generally limited to those in the Foreign Service, *see* 22 U.S.C. § 4043, the Foreign Service Act of 1980 allowed those who converted to civil service positions to "elect in writing to continue to participate in the [FSRDS] instead of the [CSRS] so long as [they are] employed in an agency which is authorized to utilize the Foreign Service personnel system." *Id.* § 4156(b)(1).

Strawberry's arguments are meritless. Section 4052(a) other statutory provision affirmatively exempting from the FSRDS's mandatory retirement provision those who converted to civil service positions but elected to remain in the FSRDS. Rather, he seems to suggest that these employees are not subject to the mandatory retirement provision because § 4052(a) refers only to the Foreign Service, not to the civil service. However, § 4052(a) naturally refers only to retirement from the Foreign Service,

since it is part of the Foreign Service Retirement and Disability System. (Section 4051, the voluntary retirement provision, likewise refers only to retirement "from the Service.") We cannot conclude that, in allowing Strawberry and othes to participate in the FSRDS although they no longer held Foreign Service positions, Congress intended to exempt them from the burdens imposed on other FSRDS participants while affording them the same benefits. Instead, we hold that Strawberry and othes who elected to continue their participation in the FSRDS remained subject to the terms of the FSRDS, including the mandatory retirement provision.

Strawberry subsequently transferred from the FSRDS to the FSPS, established under the Federal Employees' Retirement System Act of 1986. However, the Act provides that "[*a*]*ny participant* [in the FSPS] may be retired under the conditions specified in section 4051 of this title and *shall be retired under the conditions specified in sections 4052* and 4053 of this title and receive benefits under this part." *Id.* § 4071d(a)(1) (emphasis added). Thus, those who elected to participate in the FSPS remain subject to § 4052's mandatory retirement age.

Because Strawberry did not raise the argument below, we need not address his contention that applying the mandatory retirement age to FSPS participants is inconsistent with the requirement that FSPS participants be treated like FERS participants. *See, e.g., District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984).[2] However, we note that § 4071(b) states that,

> [*e*]*xcept as otherwise specifically provided in this part or any other provision of law*, the provisions of chapter 84 of Title 5 shall apply to all participants in

[2] Strawberry likewise did not argue below that applying the mandatory retirement age renders the FSPS superfluous. The basis for this argument is unclear and, to the extent that the argument differs from Strawberry's FERS-based argument, we need not address it in light of his failure to raise it below.

> the [FSPS] and such participants shall be treated in all respects similar to persons whose participation in the [FERS] provided in that chapter is required (emphasis added).

As noted above, § 4071d(a)(1) specifically provides that FSPS participants shall be retired under the conditions stated in § 4052. Thus, applying the mandatory retirement age to FSPS participants is not precluded under § 4071(b), and any resulting difference in the treatment of FSPS and FERS participants is required by the Act itself.

Finally, the district court correctly held that the mandatory retirement provisions of the 1980 and 1986 Acts do not run afoul of the ADEA. As the district court noted, Congress maintained but increased the mandatory retirement age in 1980 and applied the mandatory retirement age to FSPS participants in 1986. Both actions occurred after the ADEA was made applicable to federal emloyees. It is well-established that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . ." *Morton v. Mancari*, 417 U.S. 535, 550 (1970). Thus, the district court correctly held that the ADEA's general prohibition of age discrimination does not prohibit enforcement of the mandatory retirement provisions. We therefore grant the Secretary's motion for summary affirmance.

So ordered.

APPENDIX B

[Filed Jun. 4, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-1946 (JR)

KENNETH STRAWBERRY,
Plaintiff,

v.

WARREN CHRISTOPHER, SECRETARY
U.S. DEPARTMENT OF STATE,
Defendant.

MEMORANDUM

Plaintiff alleges that his mandatory retirement pursuant to the Foreign Service Act of 1980 amounted to intentional discrimination by the Department of State, in violation of the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. §§ 621-634 *et seq.* Before the court is defendant's motion for summary judgment.

Facts

Plaintiff was an employee at the Department of State in a position with the Foreign Service. Pursuant to Foreign Service Act of 1980, 22 U.S.C. § 4154, plaintiff's job was converted from a Foreign Service position to a Civil Service position effective February 14, 1984. At that time, plaintiff elected to remain a participant in the Foreign Service Retirement and Disability System

(FSRDS). In 1987, plaintiff chose to transfer to the Federal Service Pension System (FSPS). By this election, plaintiff remained subject to the mandatory retirement provision of 22 U.S.C. § 4052(a), which Congress made applicable to persons enrolled in the FSPS in 1986. Retirement for FSPS employees is mandatory at age 65, absent a determination by the Secretary of State that it is "in the public interest" to retain an employee on active service past that age.

Pursuant to those mandatory retirement provisions, plaintiff was due to retire on July 31, 1995, the end of the month in which he reached the age of 65. In April 1995, the State Department denied plaintiff's request to remain in employment past age 65 under the "public interest" exception. On July 13, 1995, the Department notified plaintiff that he would be mandatorily retired. Plaintiff retired on July 31, 1995.

Analysis

Plaintiff challenges the application of the mandatory retirement provisions of the FSPS on the ground that they are contrary to the anti-discrimination provisions of the ADEA.

Congress amended the ADEA to cover federal employees in 1974. The ADEA, as amended, did not invalidate then existing mandatory retirement ages applicable to certain classes of federal employees, including Foreign Service officers. *See Bradley v. Kissinger*, 418 F. Supp. 64 (D.D.C. 1976). When Congress adopted the Foreign Service Act of 1980, it maintained the mandatory retirement provision of the Foreign Service Act of 1946, but raised the retirement age from 60 to 65. In 1986, Congress passed the Federal Employee Retirement Act which made the mandatory retirement age of 65 applicable to the new Foreign Service retirement system, the FSPS. 22 U.S.C. § 4071d.

Longstanding principles of statutory interpretation hold that, where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. *See Morton v. Mancari*, 417 U.S. 535, 550 (1974). This is particularly so when the specific statute is enacted at the same time as, or after, a more general provision. *See Bradley, supra.* The enactments in 1980 and 1986, each of which post-date the ADEA and specifically provide for the mandatory retirement of Foreign Service employees, must be given full force and effect. The ADEA's general prohibition of age discrimination cannot be read to prevent the implementation of the mandatory retirement provisions of the Foreign Service Act.

Defendant is entitled to summary judgment. An appropriate order accompanies this memorandum.

/s/ James Robertson
United States District Judge

Date: June 4, 1996

[Filed Jun. 4, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-1946 (JR)

KENNETH STRAWBERRY,
Plaintiff,

v.

WARREN CHRISTOPHER, SECRETARY
U.S. DEPARTMENT OF STATE,
Defendant.

ORDER

For the reasons set forth in the accompanying memorandum, it is this 4th day of June, 1996, ordered that defendant's motion for summary judgment [#13] is granted and this case is dismissed.

/s/ James Robertson
United States District Judge

APPENDIX C

[Filed Aug. 26, 1997]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5221

KENNETH STRAWBERRY,
Appellant

v.

MADELEINE K. ALBRIGHT, SECRETARY,
U.S. DEPARTMENT OF STATE,
Appellee

BEFORE: Wald, Williams and Tatel, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing filed June 16, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

STATUTES, REGULATIONS, AND OTHER AUTHORITIES

22 U.S.C. § 4052, Mandatory Retirement

> (a) Except as provided in subsection (b) of this section, any participant shall be retired from the Service at the end of the month in which the participant has reached age 65 and has at least 5 years of service credit toward retirement under the System (excluding military and naval service), and shall receive retirement benefits in accordance with section 4046 of this title.

22 U.S.C. 4071 Establishment; application of Federal Employees' Retirement System to Foreign Service Pension System participants.

> (a) There is hereby established a Foreign Service Pension System.
>
> (c) Except as otherwise specifically provided in this subchapter or any other provision of law, the provisions of chapter 84 of title 5, United States Code, shall appy to all participants in the Foreign Service Pension System and such participants shall be treated in all respects similar to persons whose participation in the Federal Employees's Retirement System provided in that chapter is required.

22 U.S.C. 4071b. Participants

> (a) Covered members. Except for persons excluded by subsection (b), (c), or (d), all members of the Foreign Service, any of whose service after December 31, 1983, is employment for the purpose of Title II of the Social Security Act and chapter 21 of the Internal Revenue Code of 1954, who would but for this section, be participants in the Foreign Service

Retirement and Disability System pursuant to Section 803 shall instead by participants in the Foreign Service Pension System.

(b) Exclusion of participants in Foreign Service Retirement and Disability System. Members of the Service who were participants in the Foreign Service Retirement and Disability System on or before December 31, 1983, and who have not had a break in service in excess of one year since that date, are not made participants in the System by this section, without regard to whether they are subject to title II of the Social Security Act.

(c) Exclusion of individuals with certain creditable civilian service. Individuals who become members of the Service after having completed at least 5 years of civilian service creditable under subchapter I, subchapter III of chapter 83 of title 5, United States Code, or title II of the Central Intelligence Agency Retirement Act (50 U.S.C. 2011 et. seq.) (determined without regard to any deposit or redeposit requirement under any such subchapter or title, any requirement that the individual become subject to such subchapter or title after performing the service involved, or any requirement that the individual give notice in writing to the official by whom such individual is paid of such individual's desire to become subject to such subchapter or title) are not participants in the System, except to the extent provided for under title II of the Federal Employees' Retirement System Act of 1986 pursuant to an election under such title to become subject to this subchapter (under regulations issued by the Secretary of State pursuant to section 860.

(d) Exclusion of temporary or intermittent employees. The Secretary may exclude from the operation of this subchapter any member of the Foreign

Service, or group of members, whose employment is temporary or intermittent, except a member whose employment is part-time career appointment or career candidate appointment under Section 306.

22 U.S.C. § 4071d Entitlement to annuity

(a) Retirement or conditions; definitions.

(1) Any participant may be retired under the conditions specified in section 811 and shall be retired under the conditions specified in sections 812 and 813 and receive benefits under this subchapter.

29 U.S.C. 633a Nondiscrimination on account of age in Federal Government Employment

(a) Federal agencies affected.

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5, (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5221
(C.A. No. 95-1946)

KENNETH STRAWBERRY,
Appellant,

v.

WARREN CHRISTOPHER,
SECRETARY U.S. DEPARTMENT OF STATE,
Appellee.

APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

Appellee, Warren Christopher, Secretary of the United States Department of State (State), moves for summary affirmance of the Order of June 4, 1996 of the Honorable James Robertson, finding that State did not violate the Age Discrimination in Employment Act by requiring appellant to retire, and dismissing the action (copy attached). Appellee submits that the "merits of this appeal are so clear as to make summary affirmance proper," *e.g., Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (*per curiam*), *cert. denied*, 449 U.S. 994 (1980); *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982) (*per curiam*), and "no benefit will be gained from further briefing and argument of the issue presented." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987) (*per curiam*).

I.

Appellant alleged that his mandatory retirement pursuant to the Foreign Service Act of 1980, 22 U.S.C. § 4156 [1], was intentional discrimination by the Department of State, in violation of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. §§ 621-634 *et seq.* (1988).

As an employee of the Department of State and pursuant to § 4154 of the Foreign Service Act of 1980, as amended, appellant was mandatorily converted from a Foreign Service reserve position to a position in the civil service effective on February 14, 1984. Complaint at ¶ 4; Declaration of Daniel Webber ("Webber Dec."), attached as Exhibit A, at ¶ 4 to Defendants Motion for Summary Judgment. Opinion at p. 1. In conjunction with his conversion, appellant was given an option, pursuant to § 4156(b), to remain a participant in the Foreign Service Retirement and Disability System ("the FSRDS") or to transfer to the Civil Service Retirement and Disability System (the "CSRS"). Appellant elected to remain in the FSRDS. Webber Dec., at ¶ 4. The FSRDS permits earlier retirement with a more generous annuity formula than the CSRS. But, unlike the CSRS, the FSRDS mandates retirement at age 65.[2] When Congress passed the Federal Retirement System Act of 1986 (P.L. 99-335). 22 U.S.C. § 4071i, appellant was given the opportunity to remain in the FSRDS or to transfer to the new Foreign

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[1] The provisions addressing retirement are found at 22 U.S.C. §§ 4052, 4071d, and 4156(b).

[2] The FSRDS permits participants to retire at age 50 after 20 years of service, at Section 4051, with an annuity equal to 2% of the employee's basic pay (averaged over the highest-salaried 3 consecutive years) for each year of service up to 35 years of service, 22 U.S.C. § 4046(a). Participants in the FSRDS are required to retire at the end of the month in which they reach age 65. 22 U.S.C. § 4052(a).

Service Pension System ("the FSPS"). On October 25, 1987, appellant elected to transfer to the FSPS.[8]

By choosing to transfer to the FSPS, appellant remained subject to the mandatory retirement provision at age 65 of Section 4052(a), which Congress made applicable to the FSPS through Section § 4071d, in 1986. An employee may not avoid mandatory retirement unless (s)he has a presidential advice-and-consent appointment or the Secretary of State determines under Section § 4052(b), that it is "in the public interest" to retain the participant on active service for a period not to exceed five years. 22 U.S.C. § 4052(b).

Under these provisions, appellant was due to retire on July 31, 1995, the end of the month in which he reached the mandatory retirement age of 65. In April 1995, the State Department denied appellant's request to remain in employment past age 65 under the "public interest" exception. On July 13, 1995, the Department notified appellant that he would be mandatorily retired. Appellant retired on July 31, 1995. Complaint, at ¶¶ 7, 8.

Appellant challenged the application of the mandatory retirement provisions of the FSPS as unlawful on a theory that it is contrary to the non-discrimination provisions of the ADEA. Appellant conceded that the ADEA permits an employer to consider an employee's age if there is a "statutory exemption or other defense." Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Opposition") at p. 2. He argued, however, that the retirement provisions of the Foreign Service Act, that

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[8] Similar to the FSRDS, the FSPS allows retirement at age 50 after completing 20 years of service, but it provided a slightly lower annuity formula of 1.7%, as opposed to the 2% annuity of the FSRDS. However, the FSPS provides Social Security coverage and a Thrift Savings Plan, which allows employees to deposit up to 10% of their tax-deferred salaries, the government providing matching funds of up to 5% of the deposited salary. 22 U.S.C. § 4071; 22 U.S.C. § 4071(b)(2); 5 U.S.C. §§ 8431-8440d.

applied to him by virtue of his voluntary selection of retirement plans, "applie[d] only to individuals in the Foreign Service," and, thus, did not apply to appellant since he had been converted to the civil service system. *Id.* at 2-3. The District Court rejected appellant's position, concluding that the mandatory retirement provisions of the FSPS, in which appellant chose to participate, are not invalidated by the ADEA, as amended. Memorandum Opinion filed June 4, 1996 ("Opinion") at 3.

After considering the pleadings and evidence filed by the parties, the District Court found that the general prohibition of the ADEA "cannot be read to prevent the implementation of the mandatory retirement provisions of the Foreign Service Act." Opinion at p. 3. The District Court found that the specific later provisions of the Foreign Service Act of 1980 and the Federal Employee Retirement Act—which in 1986 made the 1980 Foreign Service Act mandatory retirement age of 65 applicable to appellant—were not controlled or nullified by the general provisions of the ADEA, amended in 1974 to cover federal employees. *Id.* at 2-3. Accordingly, District Court entered judgment for appellee and dismissed the claim. This appeal of the Court's order followed.

II.

The opinion of the District Court should be summarily affirmed. Properly considering the law and the facts, the District Court found that the later specific provisions of the Foreign Service Act, which applied to appellant through the FSPS, were not nullified or controlled by the general earlier provisions of the ADEA, as amended. Opinion at 3.

When the ADEA, originally passed in 1967, was amended in 1974 to cover federal employees, Congress did not invalidate existing statutory retirement ages applicable to certain classes of federal employees, including the Foreign Service mandatory retirement age of 60. Opinion

at 2, citing *Bradley v. Kissinger*, 418 F. Supp. 64 (D.D.C. 1976).[4] When it enacted the Foreign Service Act of 1980, Congress retained the mandatory retirement provision from the Act's predecessor, the Foreign Service Act of 1946, in order to maintain opportunities for promotion and to accommodate the rigors entailed in overseas service. The legislative history makes clear that Congress decided to retain the mandatory retirement provision, even in the face of significant sentiment against such age cut-offs. (House Floor debates, Cong. Record, Vol. 126 (1980) at 24608-24667). Congress did, however, raise the retirement age from 60 to 65 to correspond with the improvements in life expectancy, health care and transportation, that occurred between 1946 and 1980. *See* H. Rep. No. 96-992(I), May 15, 180 (To accompany H.R. 6790) at 68-69; H. Rep. No. 96-992(II)) (To accompany H.R. 6790) at 85-86; S. Rep. No. 96-913, Aug. 22, 1980, (To accompany S. 3058) at 65. *See also* Opinion at 3.

Section 4156 provides in relevant part:

> Any participant in the [FSRDS] who would, but for this paragraph, participate in the [CSRS] by virtue of conversion under this subchapter shall remain a participant in the [FSRDS] for 120 days after participation in the [FSRDS] would otherwise cease.

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[4] In *Bradley v. Kissinger*, the court determined that mandatory retirement provision of the Foreign Service Act of 1946 was not inconsistent with the ADEA. It relied on the legislative intent of the ADEA, which Congress manifested by extending the Foreign Service Act's mandatory retirement provisions to employees of the Agency for International Development "contemporaneously with the 1974 extension of the ADEA to the federal government." *Bradley*, 418 F. Supp. at 69. From this intent, the court determined that the Act's mandatory retirement provisions were not undermined by the passage of the ADEA. *Id.* Since the Act concerns mandatory retirement as applied to the Foreign Service and does not affect the applicability of the ADEA to all other personnel action, it is "unlikely that Congress intended to repeal [the Foreign Service Act] by subsequently enacting the ADEA." *Id.* at 68.

> During such 120-day period, the individual may elect in writing to continue to participate in the [FSRDS] instead of the [CSRS] so long as he or she is employed in an agency authorized to utilize the Foreign Service personnel system.

22 U.S.C. § 4156(b)(1). The express language and legislative history of this section reveal that Congress did not intend to give Foreign Service Reserve Officers who were mandatorily converted to the civil service the option to remain in the FSRDS without subjecting themselves to the mandatory retirement age. Rather, Congress intended to give the converted officers the option to choose between the FSRDS, with its mandatory retirement age and relatively liberal computation formula, or the CSRS, without a mandatory retirement age and with a higher potential maximum annuity but with a less liberal computation formula. All of the reports on the bill contain identical language. H. Rep. No. 96-992 (I), May 15, 1980 at 100-01; H. Rep. No. 96-992 (II), May 15, 1980 at 113. S. Rep. No. 96-913, Aug. 22, 1980 at 96.

Moreover, Congress indicated its continued support of the mandatory retirement age when it passed the Federal Employee Retirement Act of 1986, which made the mandatory retirement age of 65 applicable to the new Foreign Service retirement system, the FSPS. Section 415 of P.L. 99-335 (adding, *inter alia,* section 855 of the Act, 22 U.S.C. 4071d; *see* H. Conf. Rep. No. 99-606, May 16, 1986 at 146-50.

"It is a cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna,* 425 U.S. 164, 168 (1977). When it adopted the Foreign Service Act of 1980, Congress had the opportunity to examine all aspects of the current enforcement mechanisms and interpretations of the retirement provisions, including the mandatory retirement age. It was aware of the State Department's construction

of the provisions. In declining to change the mandatory retirement age for members of the Foreign Service and for former Foreign Service officers converted to the Civil Service who elected to stay in the Foreign Service retirement system, its enactment of the FSPS must be seen as an adoption by Congress of such construction and implementation.[5] *See United States v. Hermano y Campania,* 209 U.S. 337, 339 (1908). This doctrine of legislative reenactment is further strengthened when Congress not only declines to change a statute, but when it has indicated that it approves of the Executive branch interpretation of the law. *E.g., United States v. Board of Comm'rs.,* 435 U.S. 110, 134 (1978).

As the District Court properly found, the provisions of the Foreign Service Act as they apply to plaintiff must be given "full force and effect." Opinion at 3. Each of the enactments "post-date the ADEA and specifically provide for the mandatory retirement of Foreign Service employees." *Id.* These specific statutory enactments presumptively take into account the existence and requirements of the ADEA. Opinion at 3. As the District Court stated, "Longstanding principles of statutory interpretation hold that, where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Id.* citing *Morton v. Mancari,* 417 U.S. 535, 550 (1974).

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[5] In 1978, Congress amended the ADEA to extend protection to employees of private employers from age 40 up to age 70, and to eliminate a mandatory retirement age for civil service employees. Sections 3 and 5 of the ADEA, P.L. 95-256 (April 6, 1978). At the same time, Congress amended the ADEA to provide that private pension and retirement plans could not require involuntary retirement before age 70, Section 2(a) of P.L. 95-256 (amending section 4(f)). Congress chose not to apply that provision to the federal government (section 5(f) specified that the only provisions that applied to federal government personnel actions were sections 5 and 12(b)), and therefore left the existing statutory retirement ages for certain federal employees in place.

Moreover, the mandatory retirement provisions of the Foreign Service Act do not conflict with the Congressional purpose or premise of the ADEA; Congress' rational basis for mandatory retirement for Foreign Service employees is different from the considerations that apply for Civil Service employees. When enacting Sections 4071d, 4052 and 4156(b) of the Foreign Service Act, Congress specifically targeted retirement requirements toward the Foreign Service because—unlike those in the Civil Service—employees in the Foreign Service endure unique personal challenges while serving overseas. Consequently, Congress intended to provide more favorable conditions for retirement.[6] *See* H. Rep. No. 93-388, 93d Cong., 1st Sess., 1973 U.S. Code Cong. and Admin. News 2806, 2845-47. Under Section 4156(b)(1) of the Foreign Service Act, Congress intentionally gave employees mandatorily converted to the Civil Service the opportunity to remain in the Foreign Service System, subject to the mandatory retirement age.[7] Congress did not choose to give these employees the option of remaining in the Foreign Service

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[6] Of course, the provisions of the Foreign Service Act must, to the extent possible, be interpreted as consistent with the ADEA. "In fact, courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done." *Sutherland Stat Cons* § 53.01 (5th Ed.); *Schorr v. Commodity Futures Trading Commission*, 740 F.2d 1262 (D.C. Cir. 1984). But when statutes appear to conflict, courts must endeavor to read them consistently. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155-57 (1978).

[7] Further, the legislative history of Section 4156 indicates that Congress had a legitimate rationale in allowing converted employees to elect to remain [in] the Foreign Service retirement system, which was to accomplish the conversion "in a matter which preserves the status and benefits that members of the Service enjoyed prior to conversion." *See* S.Rep.No. 96-913, 96th Cong., 2d Sess. at 96. By granting former Foreign Service employees this option, Congress allowed them to keep some of the benefits from their former positions—such as voluntary retirement at age 50 with 20 years of service—that could have been eliminated as a result of their mandatory conversion.

retirement system without the mandatory retirement age. Clearly it did not interpret the application of these sections as "discrimination" under the ADEA, or intend their implementation by the State Department to be prohibited by the ADEA. If it had—or if appellant is correct in construing Section 4071d, 4052 and 4156(b) of the Foreign Service Act as "inconsistent" with and invalidated by the ADEA—those statutory provisions would be rendered superfluous, ineffectual, and invalid *ab initio*.

Statutory construction principles, of course, militate in favor of construing provisions so as to have full effect and purpose. It is a fundamental canon of statutory interpretation that "effect is given to all its provisions, so that no part will be inoperative or superfluous . . . and so that one section will not destroy another unless the provision is the result of obvious mistake or error." *Sutherland Stat Cons* § 46.06 (5th Ed.). Hence, as the District Court properly found, the ADEA prohibition on age discrimination cannot be read to encompass implementation of Sections 4071d, 4052 and 4156(b) of the Foreign Service Act. Opinion at 3.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court in favor of appellee should be summarily affirmed.

/s/ Eric H. Holder, Jr.
ERIC H. HOLDER, JR.
United States Attorney

/s/ R. Craig Lawrence
R. CRAIG LAWRENCE
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/s/ Darya Geetter
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Assistant United States Attorney

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5221

KENNETH STRAWBERRY,
Appellant

v.

WARREN CHRISTOPHER, SECRETARY,
Appellee

RESPONSE OF APPELLANT TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

STATEMENT OF FACTS

This matter before the court is a case of first impression. The appellant, Kenneth Strawberry, hereinafter Mr. Strawberry, was initially employed with the Department of State, the appellee, herein, hereinafter the agency, as an officer in the Foreign Service. On March 14, 1984, Mr. Strawberry was mandatorily converted to the agency's civil service, "Plaintiff's Statement of Genuine Issues, ¶ 2," "Memorandum In Support Of Defendant's Motion For Summary Judgment, p. 3," in accordance with the 1980 Foreign Service Act, 22 U.S.C. § 4154. Mr. Strawberry remained in his position in the civil service, and in accordance with 22 U.S.C. § 4154 was not subject to service in positions overseas and not available for worldwide service. 22 U.S.C. § 4052(a) requires that individuals in the agency's foreign service must retire at age sixty-five.

In 1987, Mr. Strawberry elected to join the agency's Foreign Service Pension System, "Memorandum In Support Of Defendant's Motion For Summary Judgment, p. 4. The Foreign Service Pension System (FSPS), 22 U.S.C § 4071 et seq. was established by Congress to apply the Federal Employees' Retirement System to the Foreign Service Pension System and required that all participant's be treated in the same manner as participants under the Federal Employees' Retirement System, 5 U.S.C. § 8401 et seq. Participants in the FSPS are provided social security coverage, a Thrift Savings Plan and a lower annuity based upon service and contributions, "Declaration of Daniel Webber, ¶ 9, Memorandum In Support Of Defendant's Motion For Summary Judgment." 22 U.S.C. § 4071 (d)(a)(1) provides that a participant in the FSPS "may be retired under the provisions of 22 U.S.C. § 4051 and shall be retired under the conditions specified in 22 U.S.C. §§ 4052 and 4053." 22 U.S.C. § 4052 provides that "members of the Foreign Service" [my emphasis] shall be retired at age sixty-five. The House Conference Report supporting the enactment of 22 U.S.C. § 4052a expressed the clear intent of Congress to provide a mandatory retirement age of sixty-five for members of the Foreign Service who were subject to assignment to overseas posts, "Plaintiff's Statement of Genuine Issues In Response To Defendant's Motion For Summary Judgment, ¶ 7." Except for members of the Foreign Service serving in civilian positions to retire at age sixty-five.

On July 31, 1995, the agency removed Mr. Strawberry from his position based upon the premise that he had reached the mandatory retirement age of sixty-five, "Plaintiff's Statement Of Genuine Issues In Response To Defendant's Motion For Summary Judgment, ¶ 4." The defendant does not dispute that the plaintiff was retired and removed from his position solely based upon his age, "Appellee's Motion For Summary Affirmance, p. 5."

ARGUMENT

The Age Discrimination In Employment Act § 633a prohibits discrimination in all personnel actions in federal employment based upon age. In *Vance et al. v. Bradley, et al.*, 440 U.S. 93, 100-105, 99 S. Ct. 939, 58 L. Ed. 2d 171 (1979), the United States Supreme Court in reviewing the mandatory requirement provision, 22 U.S.C. § 4052(a), under the Due Process Clause of the Fifth Amendment to the Constitution, held that the mandatory retirement was justified due to hazardous working conditions, a need for Foreign Service which was unlike the duty of employees serving in the civil service in Washington. The Court did not have before it the issue of a violation of the Age Discrimination in Employment Act and therefore did not review that issue.

Congress in enacting the Foreign Service Pension System, at 22 U.S.C. § 4071b, in 1986, specifically removed employees such as Mr. Strawberry from the Foreign Service Retirement and Disability System which required mandatory retirement at age sixty-five. The agency's forced retirement of Mr. Strawberry was contrary to 22 U.S.C. § 4071a whch applied the Federal Employees' Retirement System to participants of the FSPS. The Secretary of the agency was required to promulgate regulations which conformed the FSPS to the Federal Employees' Retirement System provisions, 22 U.S.C. §§ 4071h, 4071i.

In *Hazen Paper v. Biggins*, 113 S. Ct. 1701, 1707, 124 L.Ed.2d 656, the United States Supreme Court held that the Age Discrimination In Employment Act requires an employer to ignore an employee's age absent a statutory exemption or other defense. *Valaris v. Army and Air Force Exchange*, 577 F. Supp. 282, 286 (N.D. CA. 1983) held that the protection against age discrimination in the federal sector may be broader than the private sector since the federal provisions of the statute prohibit discrimination in all personnel actions without exception. The court's summary dismissal without discovery was er-

roneous in this case where it was undisputed that Mr. Strawberry was no longer employed in the Foreign Service and the agency set forth no facts to show that the mandatory retirement provisions applied to individuals in the civil service. The mere fact that a participant served in the Foreign Service is clearly not the basis for the enactment of the mandatory retirement age. A mandatory retirement age of sixty-five renders the enactment of the FSPS superfluous. The establishment of the FSPS specifically provided that the Federal Employees' Retirement System would apply to participants in this plan. Such a distinction would be unnecessary, if Congress intended the mandatory retirement age to apply simply upon an employee's participation in the agency's retirement system, such a restriction was in existence for all participants of the Foreign Service Retirement and Disability System. In addition there would be no necessity for Congress to instruct the Secretary to promulgate separate regulations consistent with the Federal Employees' Retirement System.

The issues presented for review on this appeal are of first impression. The order of the district court granting summary judgment is in error since Mr. Strawberry was not a member of the Foreign Service nor a member of the Foreign Service Retirement and Disability System, at the date when he was mandatorily retired from employment based upon his age. The termination of an employee's employment based upon age is a violation of the Age Discrimination In Employment Act. The agency provided no reason for its termination of Mr. Strawberry's employment other than his age. The agency's Motion For Summary Affirmance should be denied.

Respectfully Submitted,

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No. 97-902

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In the Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH R. STRAWBERRY, PETITIONER

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the mandatory retirement provision of the Foreign Service Act of 1980, 22 U.S.C. 4052(a), applies to an employee of the Department of State who was transferred from the foreign service to the civil service and who elected to participate in the Foreign Service Retirement and Disability System and, subsequently, the Foreign Service Pension System.

2. Whether the court of appeals correctly held that the mandatory retirement provision of the Foreign Service Act of 1980, 22 U.S.C. 4052(a), does not violate the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-902

KENNETH R. STRAWBERRY, PETITIONER

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 111 F.3d 943. The opinion of the district court (Pet. App. 7a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1997. A petition for rehearing was denied on August 26, 1997. Pet. App. 11a. The petition for a writ of certiorari was filed on November 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner worked for the Department of State in a foreign service position. In 1984, he was "converted" from the foreign service to the civil service

pursuant to 22 U.S.C. 4154(a), which requires such conversion when an employee of the Department of State is no longer "available for worldwide assignment." See 22 U.S.C. 4152(b), 4153(d). Pet. App. 2a, 7a.

Petitioner had the option of remaining in the Foreign Service Retirement and Disability System (FSRDS) or transferring to the Civil Service Retirement and Disability System. See 22 U.S.C. 4156(b). He elected to remain in the FSRDS, which had a more generous annuity formula and an earlier retirement option, but which required him to retire at age 65. See 22 U.S.C. 4052(a) (providing that an FSRDS participant "shall be retired from the Service at the end of the month in which the participant has reached age 65 and has at least 5 years of service credit toward retirement under the System"). Pet. App. 2a, 7a-8a.

After Congress adopted the Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514, petitioner had the option of remaining in the FSRDS or transferring to the new Foreign Service Pension System (FSPS). See 22 U.S.C. 4071i. He elected to transfer to the FSPS, which provided a slightly smaller annuity than the FSRDS, but which also offered Social Security coverage and a thrift savings plan. See 22 U.S.C. 4071. He remained subject to the mandatory retirement provision of 22 U.S.C. 4052(a), which Congress made applicable to persons enrolled in the FSPS. See 22 U.S.C. 4071d(a) (providing that FSPS participants "shall be retired under the conditions specified in sections 4052 and 4053"). Pet. App. 2a, 8a.

Petitioner was required to retire on July 31, 1995, the last day of the month in which he reached age 65.

The Secretary of State denied petitioner's request for a waiver of mandatory retirement under 22 U.S.C. 4052(b)(2), which allows an employee to be retained if "the Secretary determines it to be in the public interest." Pet. App. 2a, 8a.

Petitioner filed suit in the United States District Court for the District of Columbia, contending that his mandatory retirement violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* Pet. App. 2a.

2. The district court dismissed petitioner's suit on summary judgment. Pet. App. 7a-9a. Applying the "[l]ongstanding principle[] of statutory interpretation" that "a specific statute will not be controlled or nullified by a general one" absent a clear indication of a contrary legislative intent, the court held that the specific mandatory retirement provision in the Foreign Service Act of 1980, 22 U.S.C. 3901 *et seq.*, was not nullified by the ADEA's general prohibition against age discrimination. Pet. App. 9a (citing *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). The court noted that Congress had extended the ADEA to federal employees in 1974. But Congress had not at the same time invalidated the existing mandatory retirement ages applicable to certain federal employees, including FSRDS participants. And Congress had since enacted the Foreign Service Act of 1980, and the Federal Employees' Retirement System Act of 1986, both of which contained specific mandatory retirement provisions. Pet. App. 8a.

3. The court of appeals granted the government's motion for summary affirmance. Pet. App. 1a-6a. The court first rejected petitioner's argument that he was no longer subject to mandatory retirement under 22 U.S.C. 4052(a) once his position was converted

from the foreign service to the civil service in 1984. The court concluded that, because petitioner elected to continue to participate in the FSRDS, he "remained subject to the terms of the FSRDS, including the mandatory retirement provision." Pet. App. 5a. Nor did petitioner escape the mandatory retirement provision when he transferred from the FSRDS to the FSPS, given that 22 U.S.C. 4071d(a)(1) applies the mandatory retirement provision to FSPS participants. Pet. App. 5a.

The court of appeals then affirmed the district court's conclusion that "the ADEA's general prohibition of age discrimination does not prohibit enforcement of the mandatory retirement provisions" for participants in the FSRDS and the FSPS. Pet. App. 6a. The court noted that Congress had twice addressed the mandatory retirement requirement applicable to petitioner since extending the ADEA to federal employees in 1974—by raising the mandatory retirement age for FSRDS participants in 1980 and by applying the mandatory retirement provision to FSPS participants in 1986. The court could thus discern no congressional intent that the ADEA nullify the specific mandatory retirement requirements for FSRDS and FSPS participants. *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner, like other participants in the Foreign Service Retirement and Disability System (FSRDS) and the Foreign Service Pension System (FSPS), was required under 22 U.S.C. 4052(a) to retire at age 65. Congress applied that mandatory retirement provision to all FSRDS and FSPS participants, including those who, like petitioner, were transferred from the foreign

service to the civil service due to their unavailability for worldwide assignment. And Congress nowhere indicated that the general provisions of the Age Discrimination in Employment Act (ADEA) were intended to modify or nullify the specific mandatory retirement provision applicable to petitioner and other FSRDS and FSPS participants. The court of appeals' decision does not conflict with any decision of this Court or any other circuit. It therefore merits no further review.

1. Petitioner contends (Pet. 7) that Section 4052(a) "was not intended by Congress to apply to individuals in the civil service." As the text of the relevant statutes makes clear, however, Section 4052(a) applies to all FSRDS and FSPS participants, whether they are in the foreign service or the civil service when they reach age 65.

Section 4052(a) provides that "any participant" in the FSRDS "shall be retired from the Service at the end of the month in which the participant has reached age 65 and has at least 5 years of service credit toward retirement under the [FSRDS]." No exception is made for FSRDS participants, such as petitioner, who were converted from the foreign service to the civil service under 22 U.S.C. 4154 because they were unavailable for worldwide assignment. The statute's reference to "retire[ment] from the Service" does not mean that only those FSRDS participants who are not transferred out of the foreign service are subject to mandatory retirement. As the court of appeals explained, "§ 4052(a) naturally refers only to retirement from the Foreign Service, since it is part of the Foreign Service Retirement and Disability System." Pet. App. 4a-5a; see also 22 U.S.C. 4051 (similar reference to "the Service" in voluntary retirement provi-

sion). There is, however, no basis for assuming that Congress intended to exempt petitioner and other FSRDS participants who were converted out of the foreign service "from the burdens imposed on other FSRDS participants while affording them the same benefits" (Pet. App. 5a)—which were more generous than the benefits that they would have received had they elected under 22 U.S.C. 4156(b)(1) to transfer to the Civil Service Retirement and Disability System (Pet. App. 2a). In short, Congress did not evince any intent to allow petitioner, and others similarly situated, to have their cake and eat it too.

Petitioner likewise remained subject to the mandatory retirement provision of Section 4052(a) after he transferred from the FSRDS to the FSPS. Congress expressly provided that "[a]ny participant" in the FSPS "shall be retired under the conditions specified in section[] 4052." 22 U.S.C. 4071d(a)(1). Petitioner nonetheless contends (Pet. 6) that the Court should ignore the plain language of that provision, because Congress intended that FSPS participants generally "be treated in the same manner as persons in the Federal Employees' Retirement System." But Congress actually provided that FSPS participants are to be treated similarly to Federal Employees' Retirement System participants "[e]xcept as otherwise specifically provided in this part [*i.e.*, the FSPS provisions of Title 22] or any other provision of law." 22 U.S.C. 4071(b). One such exception is 22 U.S.C. 4071d(a)(1), which subjects FSPS participants to mandatory retirement.

Petitioner asserts (Pet. 4), without explanation, that the court of appeals' decision "is contrary to" this Court's decision in *Vance* v. *Bradley*, 440 U.S. 93 (1979). In *Vance*, however, the Court rejected an

equal protection challenge to the statutory predecessor to Section 4052(a), which required FSRDS participants to retire at age 60, whereas participants in the Civil Service Retirement and Disability System were not subject to mandatory retirement. See 440 U.S. at 95-96, 109. *Vance* is thus entirely consistent with the decision below.

2. Petitioner also contends (Pet. 7) that subjecting FSRDS and FSPS participants to mandatory retirement under Section 4052(a) violates the ADEA. The court of appeals correctly concluded that the ADEA's general provision that federal employees "shall be made free from any discrimination based on age," 29 U.S.C. 633a(a), does not override the specific statutory provisions establishing a mandatory retirement age for FSRDS and FSPS participants. It is well-settled that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); accord *Edmond* v. *United States*, 117 S. Ct. 1573, 1578 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.").

Congress expressed no such "clear intention otherwise" with respect to the statutes at issue here. In 1974, when Congress amended the ADEA to cover federal employees, Congress did not invalidate the existing mandatory retirement provisions applicable to certain federal employees, including FSRDS participants. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(b)(2), 88 Stat. 74-75 (codified at 29 U.S.C. 633a); see also *Johnson* v. *Baltimore*, 472 U.S. 353, 357 (1985) (noting that 1978 amendments to ADEA "left untouched several mandatory retirement provisions of the federal civil service statute

applicable to specific federal occupations, * * * as well as mandatory retirement provisions applicable to the Foreign Service and the Central Intelligence Agency"). And Congress has since affirmatively authorized mandatory retirement for certain federal employees. In 1980, for example, Congress reenacted the mandatory retirement provision applicable to FSRDS participants, while raising the retirement age from 60 to 65. Foreign Service Act of 1980, Pub. L. No. 96-465, Tit. I, § 812, 94 Stat. 2113. (codified at 22 U.S.C. 4052(a)). In 1986, Congress extended that provision to participants in the newly created FSPS. Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, Tit. IV, § 415, 100 Stat. 617 (codified at 22 U.S.C. 4071d(a)(1)). Accordingly, as the court of appeals concluded, Section 4052(a) "do[es] not run afoul of the ADEA." Pet. App. 6a.

Finally, petitioner suggests (Pet. 5, 6) that the mandatory retirement requirement for FSRDS and FSPS participants violates the ADEA for the same reasons as did the mandatory retirement requirements in *Western Airlines* v. *Criswell*, 472 U.S. 400 (1985), and *Johnson* v. *Baltimore*, *supra*. But those decisions are inapposite. Both involved the application of the ADEA's exception for bona fide occupational qualifications, see 29 U.S.C. 623(f)(1), as applied to commercial airline flight engineers in *Western Airlines* and to city firefighters in *Johnson*. That exception to the ADEA is not at issue in this case. Neither *Western Airlines* nor *Johnson* involved a claim that the ADEA exempted a category of federal employees from a specific mandatory retirement provision enacted by Congress. Indeed, the Court in *Johnson* recognized, consistent with the decision here, that federal law-enforcement officers and federal firefight-

ers remained subject under 5 U.S.C. 8335(b) to mandatory retirement at age 55 "despite the provisions of the ADEA." 472 U.S. at 357. Accordingly, nothing in either case casts any doubt on the correctness of the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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